Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1537

VOLKSWAGENWERK ARTIENGESELLSCHAFT and
VOLKSWAGEN OF AMERICA, INC.,
Petitioners

v.

THE HONORABLE R. DIXON HERMAN, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
SELDON P. TODD, JR., CAMERON AUTO, INC.
and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: The Honorable the Chief Justice and
the Associate Justices of the Supreme
Court of the United States

Respondent, Seldon P. Todd, Jr., opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below
& Jurisdiction

OPINIONS BELOW

In addition to the memoranda and orders reprinted by Petitioners, the order of Judge R. Dixon Herman dated January 28, 1977 (granting motion for reconsideration) is pertinent to the issues raised. (Respondent's Appendix (hereinafter R.A.) 1).

JURISDICTION

The jurisdiction of this Court to review the Third Circuit's order of January 27, 1978, (A.2), is problematical for two reasons. First, the file is not in the Third Circuit, but in the District Court for the District of Columbia, where it was transferred on January 13, 1977, and where it remained but for three months, from May 10, 1977, to August 17, 1977. (A. 10, 12-13) (docket entries). The file was returned to the Middle District of Pennsylvania for these three months so that Judge Herman might refer to it concerning Petitioners' motion for reconsideration, which was then pending. (A. 12) (docket entry). Second, certiorari to the Third Circuit would bring the order of January 27, 1978, here for review, but not the questions which Petitioners wish to present. See Petitioners' Brief 2. The reason is that these issues, "equal protection" and "due process," were not preserved below.

These issues were not preserved below because Petitioners waited more than ten days before applying to Judge Herman for reconsideration of his order of January 10, 1977,[1] (A. 26-31); see (A. 10) (docket entries), and failed to act promptly to stay the transfer. This is clear from a comparison of the date of entry of Judge Herman's order denying Petioners' motion for summary judgment, January 11, 1977, with the date of

1 This order was entered on January 11, 1977. (A. 10) (docket entry).

filing of Petitioners' motion for reconsideration, January 28, 1977. (A. 10, 13). Whether or not Petitioners' motion for reconsideration was timely for the purpose of obtaining reconsideration, it was not timely for the purpose of tolling the time for appeal provided by 28 U.S.C. Sec. 2107 (1970). See infra at 4-5. See generally Gainey v. Brotherhood of Railway and Steamship Clerks, etc., 303 F.2d 716 (3d Cir. 1962) (appeal within thirty days of denial of reconsideration timely because motion for reconsideration filed within ten days).

In response to this observation, which Respondent made to Judge Herman in opposition to Petitioners' motion for certification, Petitioners argued that their motion for reconsideration was timely (even though they filed nothing within ten days of the January 10, 1977 order) "because the appealable order here is that of August 15 -- and not January 10." (Emphasis in original). (R.A. 2-5)[2] Yet in this Court, Petitioners blithely assert that their motion for certification, filed on August 24, 1977, (A. 13) (docket entry), timely sought certification of the order of January 10, 1977. Petitioners' Brief 6. Now that Petitioners admit that the controlling order was entered in January (denying summary judgment) and not in August (affirming pre-

2 Only the pertinent section of Petitioners' pleading, entitled "Reply of Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. to Plaintiff's Opposition to Certification" is included in Respondent's Appendix. Prior to this argument that the appealable order was the one of August 15, 1977, which refused to modify the original order of January 10, 1977, Petitioners argued that their motion for reconsideration was timely because it could be treated as a Rule 60(b) motion. See Fed. R. Civ. P. 60(b), 28 U.S.C. (1970). This argument suffers from the same fatal flaw as the other one: it overlooks the fact that Rule 60(b) motions do not extend the time for appeal. See 9 Moore's Federal Practice 953-54 (1975).

vious order), they also must admit that the only issue preserved below was Judge Herman's refusal to certify.[3]

This result obtains even though Petitioners sought mandamus on the merits, for three reasons. First, Petitioners failed to act promptly to stay the transfer Judge Herman ordered. Second, when Petitioners finally did act, they chose to pursue a mistaken remedy. Instead of seeking reconsideration of a transfer ordered eighteen days earlier, Petitioners should have requested a stay of the transfer in the Middle District of Pennsylvania, or filed a motion for retransfer in the District of Columbia. Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974); Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); Drabik v. Murphy, 246 F.2d 408 (2d Cir. 1959); Wilson v. Ohio River Co., 236 F. Supp. 96 (S.D. W. Va. 1964); see (A. 42-43 & n.4) (memorandum). The time to pursue a proper remedy is not suspended by the pursuit of a mistaken one. Darnell v. Illinois Central R. Co., 206 F. 445 (6th Cir. 1913). Third, the time for mandamus expired while the motion for reconsideration was sub judice. See 28 U.S.C. Sec. 2107 (1970). An order denying a motion to modify an original order is not appealable; rather, the appeal, if any, lies from the original order. Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-50 (1942). The time for appeal from the original order of January 10, 1977, entered January 11, 1977, by way of mandamus or otherwise, expired ninety days later, on April 11, 1977, unless it was suspended by Petitioners' motion for reconsideration. However, the time for appeal was not suspended by Petitioners' motion for reconsideration, because only post-judgment or order motions filed with-

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3 On the merits of this issue, it is clear that Judge Herman's decision not to certify was well within the discretion remitted to him by the statute, 28 U.S.C. Sec. 1292(b) (1970). Moreover, a refusal to certify is not appealable. Re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975).

in ten days of the date of the judgment or order extend the time for appeal. Fed. R. Civ. P. 59(e), 28 U.S.C. (1970); 9 Moore's Federal Practice 953-54 (1975). Thus, Petitioners' time for appeal from the order of January 10, 1977 expired on April 11, 1977, but the petition for writ of mandamus was not filed until January 12, 1978. (A. 1) (docket entry). It follows that their belated petition for writ of certiorari cannot bring the merits of Judge Herman's order of January 10, 1977 to this Court for review.

QUESTIONS PRESENTED

I. Whether a motion for reconsideration of an original order denying a motion for summary judgment on the merits, filed more than ten days after entry of the order, suspends the running of the time for appeal from the original order, so as to permit an appellate court to review the original order, and thus preserve for this Court alleged errors in the original order?

II. Whether defendants which are timely sued and served in the jurisdiction in which plaintiff's cause of action arose, which has a three year statute of limitations, and in which defendants are amenable to suit, are similarly situated with a co-defendant which is not amenable to suit in that jurisdiction, such that they are denied equal protection when a transfer occurs to a jurisdiction with a two year statute of limitations, and the co-defendant which was not amenable to suit in the transferor jurisdiction is dismissed on the basis of the two year statute, but they are not dismissed because plaintiff did everything necessary to preserve his rights against them under the laws of the transferor jurisdiction, having filed within the limitation period and successfully served process upon them?

III. Whether due process is denied to defendants which are notified in a memorandum filed by plaintiff that he requests a transfer, and which oppose that request in a responsive pleading prior to entry of an

order for transfer in the interests of justice, and which are given two more opportunities in writing in addition to an oral hearing in which to seek reconsideration of the transfer order, and upon reconsideration the transfer order is affirmed?

STATUTES INVOLVED

In addition to 28 U.S.C. Sec. 1404(a) (1970), this case involves 28 U.S.C. Sec. 2107 (1970), which provides, in pertinent part:

> Sec. 2107. Time for appeal to court of appeals
>
> Except as otherwise provided in this section no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

STATEMENT OF THE CASE

This statement of the case is necessary to correct four inaccuracies or omissions in the statement of the other side.

First, Petitioners incorrectly state that they requested oral argument in conjunction with their motion for summary judgment. Petitioners' Brief 5. Review of their Appendix fails to reveal any such request.[4] Even if a request had been made, whether to

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4 Respondent also reviewed documents not of record before making this observation, including Petitioners' motions for summary judgment and accompanying letters to the Clerk of the District Court for the Middle District of Pennsylvania.

schedule argument is discretionary. M. D. Pa. R. Civ. P. 301.03 (1973).[5] Second, Petitioners continually assert that Judge Herman transferred this case back to the District of Columbia without their receiving notice or an opportunity to be heard. Petitioners' Brief 5, 6, 7, 8, 12-13, 14. However, they fail to disclose that Respondent Todd's opposition to their motions for summary judgment requested retransfer of the case to the District of Columbia as an alternative to application of the Pennsylvania statute of limitations to Petitioners, who were properly sued in the District of Columbia. See (R.A. 6). Petitioners expressly addressed this issue in a responsive pleading. (R.A. 6-7). Moreover, Respondent Todd filed a formal motion for transfer with his brief in opposition to Petitioners' motion for reconsideration. (R.A. 8). It is therefore somewhat surprising that they argue to this Court that they were denied notice and an opportunity to be heard. Clearly, they had both. See also (A. 14) (memorandum at fn. 3).

Third, Petitioners misleadingly state that Judge Herman's memorandum and order of August 15, 1977 "refused to reconsider" Petitioners' equal protection and due process arguments. Petitioners' Brief 5-6. The fact is that Judge Herman granted Petitioners' request that he reconsider his ruling of January 19, 1977, by order dated January 28, 1977. (R.A. 1); (A. 10-11) (docket

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5 M. D. Pa. R. Civ. P. 301.03 (1973) provides:

> RULE 301.03 Hearings on Pre-Trial Motions.
>
> Promptly upon the expiration of the time for filing of all briefs in support of or in opposition to pre-trial motions the judge to whom the action has been assigned may order oral argument at such time and place as he shall direct, either in open court or in chambers. The judge, in his discretion, may grant oral argument at the request of either or both parties.

entry). Petitioners filed a brief on the merits in support of their motion for reconsideration, Respondent Todd filed a memorandum in opposition, Petitioners filed a brief in reply, and Respondent Todd filed a memorandum in response to Petitioners' reply. (A. 11) (docket entries). Oral argument was had to the Court on March 22, 1977. (A. 11-12) (docket entries); (A. 47) (notice). After all this, it is patent that Judge Herman was fully apprised of Petitioners' position on these issues prior to ruling on August 15, 1977. After being fully apprised, Judge Herman reaffirmed his prior decision on both issues. (A. 41-46) (memorandum). The merits of that decision are discussed later, infra at 9-11, although even if a writ of certiorari were granted, the merits of Judge Herman's order of January 10, 1977, would not come before this Court. See supra at 2-4.

Fourth, after reconsideration, Judge Herman issued his memorandum of August 15, 1977, in which he explained his previous decision in terms of alternative holdings: (1) jurisdiction of the case was lost when the file was forwarded to the District of Columbia without timely objection by Petitioners (A. 42-43) (memorandum), supra at 2; and (2) if jurisdiction to review the previous order existed, that order would be reaffirmed. (A. 43-46). Judge Herman's alternative holding of reaffirmation extended to both Petitioners' equal protection and due process arguments. (A. 43-45) (equal protection); (A. 45-46) (due process).

REASONS FOR NOT ALLOWING THE WRIT

In addition to the jurisdictional and procedural reasons outlined above, there are three other reasons not to allow the writ. First, the decision in this case does not conflict with the decisions of other federal courts which have considered the issue. Second, Petitioners' equal protection argument is frivolous. Third, Petitioners' due process argument seeks review of a nondispositive exercise of discretion, and is equally frivolous.

Petitioners claim a conflict between Judge Herman's decision in this case and the decisions in Carson v. U-Haul, 434 F.2d 916 (6th Cir. 1970) (Carson) and Brown v. Merrow Machine Co., 411 F.Supp. 1162 (D. Conn. 1976) (Brown). Petitioners make out this conflict the only way they can: by ignoring the crucial distinction between the facts of this case and the facts of Carson and Brown. The distinction is that in this case, Petitioners were properly and timely served in the District of Columbia. Only Respondent Volkswagen Atlantic, Inc. was held not amenable to suit in the District of Columbia, and, therefore, after transfer to the Middle District of Pennsylvania, only Respondent Volkswagen Atlantic, Inc. was held entitled to summary judgment on the basis of the Pennsylvania statute of limitations. (A. 29-31) (memorandum of January 10, 1977); (A. 43-46) (memorandum of August 15, 1977). This result is consistent with Carson and Brown, in which the transferee fora applied their shorter statutes of limitations to defendants not served or not subject to suit in the transferor fora. Petitioners in this case were served, and were subject to suit in the transferor forum, the District of Columbia. Indeed, in reaching his decision, Judge Herman expressly followed Carson: "The policy stated by the Supreme Court in Van Dusen [v. Barrack, 376 U.S. 612 (1964)]supra, dictates a result in this case similar to that of the Carson decision, supra." (A. 30) (memorandum). In sum, there is no conflict.

The second reason for not allowing the writ is that, on the merits, Petitioners' equal protection argument is frivolous. This is true for the same reason that there is no conflict between Judge Herman's decision and the decisions of other federal courts: Petitioners and Respondent Volkswagen Atlantic, Inc. are not similarly situated. Again quoting Judge Herman, "we find a very real distinction between the position of Volkswagen Atlantic and that of the other defendants which justifies the different treatment of the motions for summary judgment." (A. 44); see (A. 30-31). This

distinction, again, is that Volkswagen Atlantic, Inc. was held not amenable to suit in the District of Columbia, (A. 16) (docket entry), but the Petitioners were subject to suit in the District of Columbia. Petitioners' argument on the merits does not even acknowledge this fundamental difference between their position and that of Respondent Volkswagen Atlantic, Inc., much less confront it.

The third reason for not allowing the writ is that Petitioners' due process argument seeks review of a nondispositive exercise of discretion. Judge Herman's decision to retransfer this case to the District of Columbia is nondispositive because it relates only to where this case is tried, not whether it is tried. In his original order of January 10, 1977, Judge Herman stated, "[n] either Van Dusen nor Carson, however, compels dismissal of the case as to the three remaining defendants." (A. 30). And in his subsequent order of August 15, 1977, Judge Herman reemphasized:

> Our retransfer of the case was not, as defendants suggest, an alternative to dismissal. Had we not retransferred the case, the only fair course would have been to permit the case to go to trial here under the law of the District of Columbia. Given this choice, retransfer to the District of Columbia seemed to be much the more desirable course, as that is the jurisdiction in which the cause of action arose, in which plaintiff originally elected to bring suit, and in which the court's grasp of the applicable law is certainly superior to ours.

(A. 45-46). In apparent recognition of the nondispositive nature of their due process argument, Petitioners allege that it

> becomes significant in light of the choice of law argument. If the transfer is void ab initio, then the proper forum is Pennsylvania and, before the district court may reach the motion to transfer, it must determine the choice of law problem.

Petitioners' Brief 13. The futility of certiorari directed to Petitioners' due process argument is demonstrated by this excerpt from their brief. This is because the district court, per Judge Herman, already has determined the choice of law (equal protection) problem adverse to Petitioners (A. 28-31) (memorandum of January 10, 1977); and upon reconsideration, has reaffirmed that decision. (A. 43-46) (memorandum of August 15, 1977). Clearly, returning this issue to Judge Herman, because of alleged procedural irregularities in reaching it, would serve no purpose.

Moreover, the procedural irregularties which are alleged are more chimerical than real. Petitioners had notice and an opportunity to be heard before the transfer order was entered, supra at 6-8. Even if the notice and opportunity to be heard was inadequate prior to the transfer order, it was patently adequate thereafter. Had Judge Herman regretted his decision upon reconsideration, and expressed a desire but inability to reverse it because of a loss of jurisdiction, Petitioners' case might have merit. But that is not the case. In the portion of his decision on reconsideration quoted above, Judge Herman made his opinion perfectly clear that retransfer to the District of Columbia was "much the more desirable course." Supra at 10. He expressed this reaffirmation of this previous decision in a matter in which he has broad discretion, Norwood v. Kirkpatrick, 349 U.S. 29 (1955) in which he cited and weighed the pertinent considerations, see Van Dusen v. Barrack, 376 U.S. 612 (1964), after each side submitted two briefs on the issue and oral argument was had. Supra at 6-7. In light of it, Petitioners' due process argument is as frivolous as their equal protection claim.

CONCLUSION

Jurisdictional and procedural obstacles to full review make this an inappropriate case in which to issue

a writ of certiorari. Even if these obstacles were surmountable, the decision below (1) is not in conflict with the decisions of other federal courts; (2) does not raise a substantial equal protection argument because the parties who were treated differently were not similarly situated; and (3) does not present an important issue of due process because the court below made and then reaffirmed a well-reasoned decision to retransfer, in a matter remitted to sound discretion, and which considered the pertinent factors, after notice and an opportunity to be heard.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., Plaintiff	:	
v.	:	Civil Action No. 75-1307
VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC.	:	FILED Harrisburg, Pa. January 28, 1977 /s/ Donald R. Berry Clerk Per Deputy Clerk
Defendants	:	

ORDER

AND NOW to wit, this 28th day of January, 1977, it is hereby ordered that the within Motion for Reconsideration of the Defendants' Motions for Summary Judgment is hereby granted. It is further ordered that all proceedings in the United States District Court for the District of Columbia shall be stayed until further order of the Court.

BY THE COURT:

/s/ R. DIXON HERMAN
R. Dixon Herman, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., Plaintiff	:	
versus	:	
VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC. Defendants	:	Civil Action No. 75-1308

REPLY OF DEFENDANTS
VOLKSWAGENWERK ARTIENGESELLSCHAFT AND
VOLKSWAGEN OF AMERICA, INC. TO
PLAINTIFF'S OPPOSITION TO CERTIFICATION

Contrary to plaintiff's contention, the critical order is that of August 15, 1977, ultimately refusing to reconsider the court's initial decision. If any appeal is to lie, it springs from that order.

* * *

B. Defendants' Motion is Timely

The defendants' motion for reconsideration of the January 10, 1977 order sought review of all substantive issues on which the trial judge based that order. The request was not merely that the court procedurally amend or alter the order itself -- as the plaintiffs argue falls within Rule 59(e) of the Federal Rules of Civil Procedure -- but rather that the judge review the substantive claims and relieve the defendants from its operation pursuant to Rule 60(b)[1].

1. Rule 60(b) provides:

Not unlike our facts are those of Torockio v. Chamberlain Mfg. Co., 328 F. Supp. 578 (W.D. Pa. 1971), remanded, 456 F.2d 1087 (3d Cir.), reconsidered,

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertance, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken." (emphasis supplied)

56 F.R.D. 82 (W.D. Pa. 1972), affirmed, 474 F.2d 1340 (3d Cir. 1973). By an order dated June 8, 1971, the district court dismissed a sex discrimination complaint on the ground that plaintiffs had not filed their action within thirty days after the right-to-sue notice. They filed a notice of appeal on June 28, 1971, and on June 30, 1971, petitioned the district court for "Reconsideration and Review and Reinstatement of Complaint." On July 7, 1971, the district judge denied the reconsideration, not on the ground that it was untimely,[2] but on the ground that the dismissal was without prejudice and there was no necessity to reinstate the complaint. On July 26, 1971, the plaintiffs attempted to file an amended complaint. Thereafter, the court of appeals examined the unusual procedural posture; noted its uncertainty as to the character of the reconsideration petition; and remanded the case for a determination of whether, within those circumstances, the district court on July 28, 1971 would have considered favorably an application for an extension of the time in which to file a notice of appeal. 456 F.2d at 1086. The Circuit summarized its position:

> "We hold, therefore, that if, as here, a notice of appeal is filed more than 30 but less than 60 days after the entry of the judgment appealed from the district court may at any time consider a motion to validate the filing within the second 30 days for excusable neglect ... where the entry of judgment the district court may, of course, take into account the expiration of time between the entry of judgment and the making of the motion determining whether possible prejudice of the appellee from such delay would justify its denial." 456 F.2d at 1087.

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2 As we discuss later, this decision was more completely explained by the district judge on remand. 56 F.R.D. at 85-86.

Additionally, because of the remand, it suggested that the district court examine its order of July 7, 1971 and its decision not to permit the filing of an amended complaint.

On remand, the district court examined the hiatus between the June 8 order and the June 30 petition for reconsideration as a motion under either Rule 60(b)(1) or 60(b)(6), because the plaintiffs sought relief from a final judgment, and concluded that it was timely. 56 F.R.D. at 85-86. The Court of Appeals affirmed this decision. 474 F.2d at 1340.

It is significant that in Torockio the petition for reconsideration was filed twenty-two days after the initial order disposing of the case and that the court had no difficulty with the reasonableness of that time.

In this case, the defendants desire a full reconsideration and reversal of the January 10 order and took action on January 28 -- well within reason. As a result, the court should not view this as an attempt to, by a ministerial act, alter or amend the judgment. Further, there is no doubt that, within this context, defendants' motion is timely. Finally, the appealable order here is that of August 15 -- and not January 10. In this respect, the application for certification was timely, and these motions have appropriately tolled the appeal period.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., :
Plaintiff
:
versus : CIVIL ACTION
:
VOLKSWAGENWERK : 75-1308
ARTIENGESELLSCHAFT, :
VOLKSWAGEN OF AMER-
ICA, INC., VOLKSWAGEN :
ATLANTIC, INC. and
CAMERON AUTO, INC., :
a Pennsylvania Corporation,
Defendants :

BRIEF IN RESPONSE TO PLAINTIFF'S
BRIEF IN OPPOSITION TO DEFENDANTS'
VOLKSWAGENWERK ARTIENGESELLSCHAFT
AND VOLKSWAGEN OF AMERICA INC.
MOTION FOR SUMMARY JUDGMENT

* * *

Plaintiff argues in the alternative that:

"If it is found that the maintenance of this suit in Pennsylvania dictates that the statute of limitations of the forum state must apply, the court should transfer the case back to the District of Columbia. Plaintiff would be amenable to such transfer and will accordingly take a voluntary dismissal, pursuant to F.R. Civ. Pro. 41(a) against the Defendant Volkswagen Atlantic, Inc. over which jurisdiction was adjudged to be lacking in the District of Columbia."

It has been clearly set forth in Mata v. Budd Co., 44 F.R.D. 225 (1968) that once the motion for summary judgment has been granted, it having been filed prior to

any motion for transfer of the case to another forum, there is no longer any action pending in the court which could be made subject of transfer. There the United States District Court for the Eastern District of Pennsylvania stated that:

> "Moreover, having decided that the Pennsylvania two year statute of limitations would bar this action, it would appear 'that the transfer should be denied on the ground that the prior motion on the statute of limitations governs and no abuse of discretion would result from the consequent denial of the Sec. 1404(a) motion. Lyden v. Excello Corp., supra, at 397. See also, Quinn v. Simonds Abrasive Co., 199 F.2d 416 (3rd cir. 1952). Once the motion for judgment on the pleadings is granted, it having been filed prior to the motion for transfer, there is no longer any action pending in this court which may be made the subject of transfer."

If the defendants' Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., motion for summary judgment is granted by this court, then there will no longer be any action pending before this court which may be made the subject of transfer.

CONCLUSION

The defendants', Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., motion for summary judgment should be granted and the plaintiff's proposed alternative motion for transfer to the District Court for the District of Columbia should be denied.

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR. Plaintiff	:	
vs.	:	Civil No. 75-1307
VOLKSWAGEN ARTIEN-GESELLSCHAFT, VOLKSWAGEN OF AMER-ICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC., a Pennsylvania Corporation	:	
Defendants	:	

MOTION TO TRANSFER

Comes now the Plaintiff, Seldon P. Todd, Jr., by and through his attorney, Jules FInk of the firm of Katz and Fink, and files the within Motion to Transfer the above-captioned cause from the District Court for the Middle District of Pennsylvania to the District Court for the District of Columbia and as grounds therefor states:

1. 28 U.S.C. 1404(a) provides that the District Courts may transfer any civil action to any other District Court where it might have been brought if the interests of justice would be served thereby.

2. In his Order of January 10, 1977, denying Motions for Summary Judgment on behalf of Defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., and granting same on behalf of Volkswagen Atlantic, Inc., Judge R. Dixon Herman indicated that the interests of justice would best be served by retransferring this case to the District Court of the District of Columbia since Plaintiff has

done everything necessary to preserve his rights against the remaining Defendants under the laws of the District of Columbia.

WHEREFORE, this Honorable Court is respectfully requested to retransfer this cause back to the District of Columbia.

Respectfully submitted,

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